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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner Stencel Aero Engineering Corporation, submits this Reply Brief pursuant to Supreme Court Rule 24(4) in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. This Brief is submitted because Respondent, the United States, in its discussion of prior decisions erroneously suggests that there is no conflict among the decisions of the United States Courts of Appeals.

The decision of the Eighth Circuit in this case held that *Feres* v. *United States*, 340 U.S. 135 (1950), bars a government contractor's third party claim for indemnity or contribution against the United States, where the plaintiff is

a military serviceman suing the government contractor. This is in direct conflict with the decision of the Sixth Circuit in *Wellington Tranportation Co.* v. *United States,* 481 F.2d 108, at 111 (6th Cir. 1973), which held that "the *Feres* decision does not bar third party indemnity claims against the United States arising out of suits by injured servicemen." In *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972), the Tenth Circuit held that while *Feres* bars the serviceman's direct remedy against the United States, "it does not follow that a defendant third party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which will apply to the serviceman, since his is an independent remedy based upon different considerations." 464 F.2d at 1143. The Respondent fails to address these direct conflicts concerning the breadth of the application of the *Feres* doctrine.

The Respondent also argues for the application of federal "common law principles", asserting that the decisions of the Circuits on the issue at bar are not in conflict, because they uniformly apply the "common law principle" that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there could be no recovery for indemnity. Brief of the United States in Opposition, p. 6.

The notion that this "common law principle" should be and has been applied with respect to suits against the United States, contrary to the Congressional mandate that state law should apply, does not find support in the cases cited by the Government. As shown in petitioner's original brief, such cases as *Certain Underwriters at Lloyds* v. *United States,* 511 F.2d 159 (5th Cir. 1975); *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972); *General Dynamics Corporation* v. *United States,* 535 F.2d 489 (9th Cir. 1976) hold that, pursuant to the Federal Tort Claims Act, state law should be applied to determine the liability of a third party-plaintiff against the United States as a third party defendant, whatever the status of the plaintiff is in relation to the United States.

Petitioner vigorously disputes the respondent's summary treatment of Missouri law in footnote 4, which asserts that Missouri law is in accordance with the common law rule urged by the Government. As Petitioner argued to the United States Court of Appeals for the Eighth Circuit, see Appendix to the Petition pp. 7a and 8a, the law in Missouri does not require liability of the indemnitor to the injured party. For example, in Missouri a third party plaintiff may recover indemnity from an employer for injuries sustained by an employee, despite the existence of a Workmen's Compensation statute that bars recovery by the employee against the employer. *State ex rel. Laclede Gas Co.* v. *Godfrey,* 468 S.W. 2d 693 (Mo. App. 1971); *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.,* 323 S.W. 2d 788 (Mo. 1959). Hence, Missouri does not adhere to the common law rule urged by the Government that in order to recover for indemnity or contribution against the third party defendant, there must be an underlying liability between the plaintiff and the third party defendant.

At this stage, however, the determination of the applicable state law is necessarily precluded, because the Eighth Circuit erroneously, it is submitted, held for the first time that Federal Tort Claims Act is inapplicable to such a claim for indemnity, merely because the use of state law would be inappropriate in these circumstances. This is, it is respectfully submitted, contrary to the Congressional mandate of the Federal Tort Claims Act that state law apply.

CONCLUSION

For the foregoing reasons stated in its original petition, it is stated that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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Dated: New York, New York
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Affidavit of Service

I, Michael J. Holland, being over the age of 18 years an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 10th day of November 1976, served three copies of the foregoing Reply Brief of Petitioner upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
10th day of November, 1976

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County